IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 862 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KEYURBHAI RAJENDRAKUMAR BHATT & 4 - Applicant(s)
Versus
MEHTA HASMUKHLAL MANILAL & 1 - Respondent(s)

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Appearance :
MR RUSHABH R SHAH for Applicant(s) : 1 - 5.
MR MAHESH R THAKER for Respondent(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 27/07/2007

ORAL JUDGMENT

1. Present application has been filed by the applicants herein – original accused Nos.1 to 5 under section 482 of the Criminal Procedure Code

for an appropriate order to quash and set aside the criminal complaint being criminal case No.420 of 2004 pending in the Court of learned JMFC, Bhachau – Kutchh as well as he order passed by the learned JMFC issuing process against the accused persons for the offence under section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the NI Act” for short).

2. A criminal complaint being criminal case No.420 of 2004 has been filed by the respondent No.1 herein – original complainant against the applicants – original accused in the Court of learned JMFC, Bhachau – Katchh for the offence under section 138 of the NI Act r.w. section 420 of the Indian Penal Code alleging inter alia that cheque bearing No. 3405291 for an amount of Rs.1,43,500/- dated 25.4.2004 was issued in favour of the original complainant by the partnership firm – Mateshwari Gavar Gam Industries signed by the accused No.2 and when the said cheque was deposited, the same was

returned by the bank with an endorsement "**fund insufficient**". It was further alleged in the complaint that thereafter statutory notice was served upon the accused and within the stipulated time, the payment was not made for the amount under the cheque in question and therefore, all the applicants have committed offence under section 138 of the NI Act r.w. section 420 of the Indian Penal Code. That the learned JMFC, Bhachau issued process upon the applicants for the offence under section 138 of the NI Act on 28.9.2004 and being aggrieved and dissatisfied with the same, the applicants have preferred present application under section 482 of the Criminal Procedure Code to quash and set aside the impugned complaint in the month of January – 2007 i.e. after the period of almost two and half years.

3. Shri R.R.Shah, learned advocate appearing for the applicants has submitted that there are no averments and/or allegations against the applicants satisfying the ingredients of section

141 of the NI Act. It is submitted that there are no averments / allegations in the complaint by which the respective applicants can be held vicariously liable. It is submitted that on bare perusal of the complaint, the only allegation is against the original accused Nos.1 and 2. It is submitted that in the complaint, the applicants are joined as partners without there being averments and allegations with regard to the fact that they were in-charge and in day today affairs of the firm. Shri Shah, learned advocate appearing for the applicants has relied upon the decision of the Hon'ble Supreme Court in case of ***S.M.S. Pharmaceuticals V/s. Nita Bhalla & Another*** reported in ***(2005) 8 SCC 89*** and has submitted that as held by the Hon'ble Supreme Court, it is necessary to specifically aver in the complaint under sections 138 and 141 that at the time when the offence was committed, the accused were in-charge of and responsible for the conduct of the business of the company / firm. It is also further submitted by learned advocate appearing for the applicants that even

otherwise, in fact, the respective applicants have already retired as partners of the firm w.e.f. 18.10.2003 i.e. much before the cheque in question was issued as the cheque in question is dated 25.4.2004 and therefore also, the applicants cannot be held liable for the cheque issued after they retired as partners. He has relied upon the documents of all applicants retiring from the partnership firm dated 18.10.2003 as well as the certificate issued by the Registrar of Firms dated 18.10.2003. By making above submissions, he has requested to quash the complaint so far as the applicants are concerned.

4. Application is opposed by Shri S.P.Majmudar, learned advocate appearing for the original complainant. He has submitted that considering the averments in the complaint when the learned Trial Court has issued the summons against the respective applicants original - accused for the offences punishable under Section 138 of the NI Act the said order is not required to be

interfered with in exercise of the powers under Section 482 of the Code of Criminal Procedure. It is submitted by him that whether the applicants were in-charge of the firm or not etc., are all questions which are required to be considered at the time of trial on leading proper evidence and the same are required to be considered on appreciation of evidence. Shri Majmudar has relied upon the decision of the Hon'ble Supreme Court in the case of ***S.V. Muzumdar And Others Vs. Gujarat State Fertilizer Co. Ltd., And Another,*** reported in (***2005) 4 SCC Page 173*** in support of his submission. He has also relied upon the recent decision of the Hon'ble Supreme Court in the case of ***N. Rangachari Vs. Bharat Sanchar Nigam Limited*** reported in ***AIR 2007 S.C. Page 1682.*** It is also further submitted by him that even in the said decision the Hon'ble Supreme Court has considered its own decision in the case of ***Monaben Ketanbhai Shah and another [supra]***. Shri Majmudar has also relied upon unreported decision of the Division Bench of this Court in

the case of ***Shri Satish Chand Singhal V/s. The State of Gujarat & Others*** rendered in ***Criminal Misc. Application No. 6682 of 2005 and other cognate matters.*** It is submitted that as held by the Division Bench of this Court in the abovesaid case which is rendered after considering the decision of the Hon'ble Supreme Court in the case of ***Monaben Ketanbhai Shah and another [supra]***, the plea that the accused was not a Director of the Company at the relevant time or the contention that he had resigned as Director of the Company and therefore not liable to prosecution under Section 138 of the Act are all the defences pleaded by him and will have to be proved by him at the trial and therefore the complaint is not to be quashed under Section 482 of the Cr.P.C. Therefore it is requested to dismiss all the present applications. He has further submitted that even the accused have also not appeared before the learned Trial Court and therefore the discretionary powers under Section 482 of the Code of Criminal Procedure should not be exercised in favour of the

applicants.

5. Heard the learned advocates appearing for the respective parties.

6. At the outset, it is required to be noted that on bare perusal of the averments in the application and the allegations in the complaint, prima facie, case is made out for the offence under section 138 of the NI Act and all the ingredients for making out a case under section 138 of the NI Act are satisfied. Cheque was issued in favour of the complainant; the same was deposited and the same has been returned as dishonoured with an endorsement "**fund insufficient**"; the statutory notice was served upon the applicants and within the stipulated time, the amount under cheque in question has not been paid.

7. It is also required to be noted that there are other complaints filed against the applicants by other persons for the offence under section 138

of the NI Act and in the said complaints the learned JMFC, Bhachau issued summons for the offence under section 138 of the NI Act and the very applicants had earlier preferred Criminal Misc. Application No. 848 of 2007 and other cognate applications to quash and set aside the criminal complaints and the summons issued by the learned trial Court by making similar submissions which are made in the present application and this Court has elaborately dealt with the same and considering the various decisions of the Hon'ble Supreme Court inclusive of ***Monaben Ketanbhai Shah*** (supra)***, N. Rangachari*** (supra) and the decision of the Division Bench of this Court in case of ***Shri Satish Chand Singhal*** (supra), has dismissed all the applications by observing that whatever the submissions made on behalf of the applicants are all required to be considered at the time of trial and the complaints are not required to be quashed and set aside in exercise of the powers under section 482 of the Criminal Procedure Code. This Court also considered the fact that

the complaints are of 2004 and the present applications are filed in the year 2007 and that the applicants have never appeared before the learned trial Court. Similar is the situation in the present case also. This Court also considered the contention on behalf of the applicants that they have already retired as partners w.e.f. 18.10.2003 and for that purpose the applicants relied upon necessary entries in the Register of Firm and considering the same, this Court also noted that entire entry in the Register of Firm with regard to retirement of the partners from the firm is after the impugned cheque is issued.

8. Considering the above and for the reasons stated in the judgment and order dated 11.7.2007 passed by this Court passed in Criminal Misc. Application Nos.848 of 2007 and other cognate applications filed by the very applicants, present application is also required to be dismissed by observing that all the contentions and submissions which are raised in the present

application are required to be considered at the time of trial on leading proper evidence. Under the circumstances, present application deserves dismissal and is accordingly dismissed.

[M.R.Shah, J.]

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